Date: 20121214

Docket: IMM-11316-12

Citation: 2012 FC 1480

Vancouver, British Columbia, December 14, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CONSTRUCTION AND SPECIALIZED WORKERS' UNION, LOCAL 1611; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 115

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION; THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA; HD MINING INTERNATIONAL LTD.; CANADIAN DEHUA INTERNATIONAL MINES GROUP INC.; AND HUIYONG HOLDINGS (BC) LTD.

Respondents

REASONS FOR ORDER AND ORDER

I. The Motion

[1] In their underlying Leave and Judicial Review Application the Applicants challenge the decision or decisions of an officer or officers of the Human Resources and Skills Development Canada (HRSDC) to issue certain Labour Market Opinions (LMOs) under section 203 of the

Immigration and Refugee Protection Regulations (Regulations) which determined that offers of employment made by the Respondent HD Mining International Ltd. (HD), or by either of its corporate parents, Canadian Dehua International Mines Group Inc. (DCIMG) and Huiyong Holdings (BC) Ltd. (HH), to 201 foreign workers from China to complete work related to the extraction of a bulk sample from HD's mining coal properties near Tumbler Ridge, British Columbia, known as the Murray River Project (Project) would likely result in a neutral or positive effect on the labour market in Canada.

[2] In this motion, the Applicants seek an interim order:

(a) Staying the LMOs that are the subject of the underlying Application for Leave and Judicial Review;

(b) Enjoining the Minister of Citizenship and Immigration from issuing any further work permits pursuant to the LMOs; and

(c) Enjoining the Minister of Citizenship and Immigration from authorizing any further foreign nationals to enter Canada and receive authorizations to work pursuant to the LMOs.

II. Background

[3] Service Canada's Foreign Worker Unit in Vancouver (part of HRSDC) has issued ten positive LMOs which allow for a total of 201 foreign nationals to apply for work permits to work in Canada on extracting the bulk sample of coal from the Project at Tumbler Ridge.

[4] The LMOs were applied for in March 2012 and were approved in April of 2012.

[5] The reasons for the LMOs consist of a two-page Bulk Request Assessment and Recommendation prepared by the decision-maker, Foreign Worker Officer William McLean (Officer), with19 pages of attached notes (Reasons).

[6] Fifteen HD workers have already arrived from China and have been issued work permits. They are currently in Tumbler Ridge. The next group of workers is set to arrive within days. Their work permit applications have been processed and they only have to obtain the physical permits from Canada Border Services Agency (CBSA) when they arrive, as they hold letters of introduction which will enable CBSA to print their work permits upon arrival.

[7] The Applicants are making the Application for Judicial Review and bringing this motion because they say there are qualified Canadian workers who are willing and able to do the bulk sampling work on the Project and who will lose their opportunity to work if the foreign workers are authorized to enter Canada to work on the Project.

[8] The Temporary Foreign Worker Program operates under the *Immigration and Refugee Protection Act* (*IRPA*) and the Regulations which set out a legislative regime governing who may enter and temporarily work in Canada. The legislative regime also sets out the respective roles of HRSDC and CIC in granting the requisite rights, as well as the role of the CBSA in recognizing those rights to allow the individuals concerned to enter the country and commence the approved work.

[9] The issuance of work permits to temporary foreign workers is governed by Part 11 (Workers) of the Regulations. Section 203 of the Regulations provides that on application for a work permit a CIC officer must determine on the basis of an opinion provided by the Department of Human Resources whether certain requirements are met. Among these, the officer must determine whether (i) the job offer is genuine; and (ii) the employment of a foreign worker is likely to have a neutral or positive effect on the Canadian labour market. In making this determination, the CIC officer must take into consideration the opinion provided by HRSDC (in this case the LMOs at issue) that addresses these questions, among others. The opinion has to be based on the factors stipulated in subsection 203(3) of the Regulations:

> (3) An opinion provided by the Department of Human Resources and Skills Development with respect to the matters referred to in paragraph 1(*b*) shall be based on the following factors:
>
> (*a*) whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
>
> (*b*) whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
>
> (*c*) whether the employment of the foreign national is likely to fill a labour shortage;
>
> (*d*) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;
>
> (*e*) whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and

> (*f*) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

[10] In March and April 2012, the Respondent, HD, submitted to HRSDC, ten LMO applications with respect to a proposal to bring 201 temporary foreign workers to fill ten different positions for a specific portion of the Project at Tumbler Ridge at Murray River. The specific portion of work was to both (i) construct the decline/shaft and (ii) complete bulk sampling of coal.

[11] On April 24 and 25, 2012, the Officer issued ten LMO Confirmation decisions, confirming his opinion that approving each of the LMOs would result in neutral or positive impacts on the relevant Canadian labour market. The expiry date of the LMOs was October 23 and 24, 2012.

[12] On the basis of these ten LMO Confirmations, HD employees in China applied at the Canadian Embassy in Beijing for temporary work permits as well as temporary resident visas to allow them to travel to a Canadian Port of Entry.

[13] As of December 10, 2012, CIC had issued 194 letters of authorization (letters of introduction) and visas to the workers destined to work for HD on the Project. The expiry dates of the visas range from May 31, 2014 to May 31, 2015.

[14] Of the 194 temporary foreign workers to whom these documents were issued, 15 have arrived in Canada and have been issued work permits. Therefore, there remain approximately 179 workers who are currently able to travel to Canada with valid visas and letters of authorization.

III. Issues

[15] Essentially, the issues that arise on this motion are those that must be addressed when interim relief is sought under section 18.2 of the *Federal Courts Act* for matters that arise under the *IRPA* and the Regulations. In accordance with the Supreme Court of Canada decision in *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 and its progeny in this Court and the Federal Court of Appeal, the Applicants must establish:

(a) A serious issue with regard to the underling LMO decisions;

(b) Irreparable harm if the interim relief is not granted; and

(c) That the balance of convenience favours them as opposed to the Respondents.

IV. Analysis

(1) Introduction

[16] In her press release issued within less than a week after the Applicants commenced their Application, the Respondent Minister of Human Resources and Skills Development Canada, the Honourable Diane Finlay, expressed the government's concerns about the process that led to the LMOs:

> Our government believes that Canadians must always have first crack at job opportunities in Canada. We are not satisfied with what we have learned about the process that led to permission for hundreds of foreign workers to gain jobs at the Dehua Mines subsidiary in British Columbia.
>
> In particular, we are not satisfied that sufficient efforts were made to recruit or train Canadians interested in these jobs. Specifically, the requirement that applicants have skills in a foreign language does not appear to be linked to a genuine job requirement.
>
> It is clear to our government that there are some problems with the Temporary Foreign Worker Program. We take these very seriously

> and are currently reviewing the Program. Litigation could impede this work and lead to court battles rather than a genuine fix.
>
> In conducting our review of the Program, we recognize the impact it may have on Canadians employed in connection with the Dehua Mines project. We will seek to avoid unintended harm to their jobs.

[17] In this motion and the underlying Application for Judicial Review the Court is not being asked to review the Temporary Foreign Worker Program. The Court is, however, being asked to review the LMO decisions that led to 201 foreign workers from China being authorized to work on the Project in Canada. The anticipated Judicial Review will examine that process in detail and, if leave is granted, the Court will fully review the LMOs for legal error.

[18] The present motion does not involve a full review of the merits of the LMO decisions. Considerable controversy and public debate already surround this case, but it is important to bear in mind that, at this stage, the Court is not pronouncing upon the merits of the Application for Judicial Review but is merely deciding whether a stay should be imposed upon the LMOs, the issuance of further work permits, and the entry of foreign workers into Canada to work on the Project until such time as the underlying Application for Leave and Judicial Review has been dealt with.

[19] It is common ground that for the Court to grant such a stay the Applicants must establish serious issue, irreparable harm and balance of convenience, as those terms are defined and applied by the governing jurisprudence. This test is conjunctive and all three requirements must be satisfied.

(2) Serious Issue

[20] The Applicants say there is a serious issue in this case because:

(a) The Minister of Human Resources and Skills Development has already admitted that there were irregularities with regard to the issuance of the LMOs and has called for an investigation into their issuance;

(b) The Officer who issued the LMOs did not reasonably apply section 203 of the Regulations because there was no labour shortage and the evidence discloses that there were and are qualified Canadians who are willing and able to fill the jobs for which the LMOs were issued;

(c) The Officer failed to give proper consideration to whether the requirement for Mandarin as a language was a proper qualification for working in a coal mine and effectively precluded the hiring or training of Canadians for the positions in question;

(d) The Officer failed to properly consider whether the requirement of three years of experience in underground coal mining was legitimate or excessive for the jobs in question;

(e) The Officer also erred in finding that the Temporary Foreign Worker Program (TFWP) recruitment requirements had been met and relied upon prior recruitment efforts, conducted roughly a year earlier by a prior corporate employer;

(f) The advertising aimed at Canadian residents was clearly deficient and made no mention of benefits;

(g) The Officer also erred in finding that wages for all occupations exceeded prevailing current wage rates.

[21] It is well established that, in order to satisfy the serious issue portion of the conjunctive test, the Applicants need only show that at least one of the issues which they raise in the Application for Judicial Review is not frivolous or vexatious. See *Turbo Resources Ltd v Petro Canada Inc*, [1989] 2 FC 451. This is a low threshold to meet and does not require the Court to review or pronounce upon the full merits of the Application for Judicial Review.

[22] On the present record before me, and in particular the Bulk Request Assessment and Recommendation and the Officer's notes that make up the Reasons and decision under review, it is debatable whether a reviewable error exists. The Officer certainly seems to be aware of, and to address, the factors stipulated under section 203 of the Regulations in what is a discretionary, administrative decision that attracts considerable deference. The reviewable errors alleged by the Applicants are not equally convincing or obviously present and a further review will be needed to ascertain whether there is an unreasonable error that requires the LMOs to be quashed. However, at this stage, I cannot say that the issues raised by the Applicants are frivolous or vexatious. And given Minister Finlay's public announcement that the government itself is "not satisfied" with the process that led to the LMOs, it is clear that the serious issue requirement of the conjunctive test is satisfied on the present facts. That, however, is not sufficient in itself to grant the interim relief requested. As is typical in this type of case, serious issue is fairly easy to establish and the real debate is about whether irreparable harm will occur if the stay is not granted, and whether the balance of convenience favours the Applicants or the Respondents.

(3) Irreparable Harm

[23] When it comes to irreparable harm, the Applicants say that:

(a) Both the Applicants and the Canadian public will suffer irreparable harm because once the foreign workers are brought to Canada by HD under work permits they will be authorized to work for a stipulated two-year period and HD could well bring the full complement of 201 workers to Canada before the judicial review is decided, thus rendering the judicial review moot even if it is ultimately shown that the LMOs should not have been issued;

(b) The loss of jobs for Canadian workers will be final and there will be irreparable harm to the Canadian Labour Market because of the introduction of foreign workers at rates considerably lower than what is paid for comparable work in Canada;

(c) There will be irreparable harm to the rule of law because the statutory scheme embodied in the Regulations and HRSDC policies will have been undermined and ignored.

[24] As the Respondents point out, the irreparable harm requirement under the conjunctive test, unlike the serious issue requirement, is quite stringent. The fact that irreparable harm may arguably arise is not enough. The Applicants have to prove on a balance of probabilities that irreparable harm will result if the stay is not granted. The alleged harm cannot be speculative or hypothetical and the evidence must be clear and convincing. See, for example, the Federal Court of Appeal decision in *Haché v Canada*, 2006 FCA 424 at para 11, and *Amnesty International Canada v Canada (Canadian Forces)* 2008 FC 162 at paras 5, 68 – 70, and 123.

[25] In other words, to obtain the interim relief sought in this case, the Applicants must adduce clear and non-speculative evidence to show that irreparable harm will result between now and the time that the application for judicial review is heard if the stay is not granted.

[26] The cornerstone of the Applicants' argument is that the "Applicants and the public will suffer irreparable harm" once the foreign workers are admitted to Canada under work permits because, even if the Applicants ultimately succeed on judicial review so that the LMOs are set aside, the work permits will allow the foreign workers to remain in Canada and work for the two-year duration so that these jobs will be lost to Canadians.

[27] On the facts of the present case there are already 15 of the authorized foreign workers in Canada who are at Tumbler Ridge. Of the balance, it is expected that approximately 60 of them will arrive in mid-December (i.e. very soon) and that the rest are due to arrive later (HD's counsel informs the Court that the schedules have been disclosed and that the balance of the foreign workers will likely arrive in May, but the dates could change depending on Project needs).

[28] The Applicants say that, if the injunction is not granted, then HD might decide it would be prudent to bring the full complement of workers to Canada immediately so as to render the Judicial Review Application moot. However, I see no evidentiary basis for what is nothing more than speculation by the Applicants as to what HD might do, and the costs of bringing such workers to Canada ahead of current scheduling if they are not yet needed for the Project tell against the conjecture of the Applicants. In addition, the eyes of the media and the government of Canada are firmly fixed on the situation at Tumbler Ridge. I have found there is a serious issue. It HD were now

to depart from its indicated scheduling to try and evade the review process that is now underway, there would likely be serious consequences for the company.

[29] Based upon this argument, there is no clear and convincing, non-speculative evidence that the Applicants need an injunction to protect themselves against the consequences of those foreign workers authorized to come to Canada but who are not likely to arrive until after the Judicial Review Application is dealt with. The Judicial Review Application is being case-managed and expedited and both sides agree that it should be concluded within two or three months.

[30] In addition, it is still not clear to me that quashing the LMOs would not have consequences for the work permits. Naturally, HD takes the position that the work permits would not be affected, but this has yet to be clearly established and, no doubt, if the LMOs are quashed, the Applicants will argue strenuously that the foreign workers have no right to work in Canada. The Applicants' position is that the work permits can be struck after the workers arrive in Canada. Consequently, I don't see how the mootness argument can be clear and convincing at this point in the proceedings.

[31] In any event, as Justice Rothstein, as he then was, pointed out in *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42, mootness in itself does not amount to irreparable harm. The facts of the case have to be examined to see if irreparable harm exists. If irreparable harm exists in the present case, the harm will be to individual miners who may have been deprived of a job opportunity. I will address this harm below.

[32] The immediate concern of the Applicants and the important issue for this motion is the approximately 60 workers who are due to arrive soon and before the Leave and Judicial Review Application can be dealt with.

[33] The alleged loss of 60 jobs to the foreign workers who will arrive soon assumes that there are Canadian workers who are willing, able and qualified to take up the various positions that the Project needs at this stage in its development.

[34] Apparently, when the jobs were advertised, there were some 300 Canadian applicants, of which 97 showed up for interviews. So there was certainly some interest in the past, even if HD says that none of the applicants were qualified.

[35] As regards the present situation, the Applicants have produced the affidavit of Mr. Brian Cochrane who is the Business Manager of the International Union of Operating Engineers, Local 115, and who says that Local 115 has members who are qualified and available to perform the type of work which is involved with bulk sampling and who are presently unemployed or underemployed and who would be willing to work on the Project. He says that he has no means of getting direct evidence of the nature of the work for which the LMOs were issued, but he is aware of media reports and job advertising and he says that the type of work involved is "routine in mining and is the type of work that Local 115 members frequently perform."

[36] Mr. Cochrane also says that "Local 115 maintains a dispatch list for members who are out of work" and that, currently, "there are 474 people on the dispatch list in British Columbia who are available for work, including 100 in the Northeastern Region of BC."

[37] What this evidence tells us is that there is a pool of Local 115 members who are out of work and so, potentially at least, could be interested in, and qualified to do, the jobs that the 60 foreign workers will be taking up on the Project.

[38] What the Court doesn't have at this stage, however, is any evidence from individual members or miners establishing that they are able, willing and qualified for the jobs in question. I am not doubting Mr. Cochrane's veracity here or his ability to speak to the matters he sets out in his affidavit, except those parts that are argument. But his evidence only goes so far. He is not a mining expert, so that the Court is dealing with a personal opinion on the needs of the Project and the qualifications required of those who work on it. But more importantly the Court is provided with no direct evidence from anyone who might be interested in these jobs. The people who everyone is concerned about, including it seems the government of Canada, do not give evidence and there is no explanation for this.

[39] If individual members will suffer harm, the Court needs to know the specifics of how many are interested in these jobs and why they are qualified, and the loss they will suffer and why it is irreparable in their case. It is difficult to assume as a general proposition that all of the members referred to by Mr. Cochrane will suffer irreparable harm. The situation is complex because the Court does not know, even roughly, how many jobs could be lost to qualified Canadians, or

whether the individuals in question would be qualified for the jobs that are due to commence after the judicial review is heard. Mr. Cochrane doesn't tell the Court specifically who is interested and how many people are interested. A large portion of the foreign workers are not due to arrive until after the Leave and Judicial Review Application is dealt with. If the LMOs are quashed the pool of potential Canadian workers can then come forward.

[40] Even if the Court accepts that some jobs could be lost to qualified Canadians, the Court still needs evidence on what this means in terms of irreparable harm for the individuals involved and how many there are, not just for the purposes of assessing irreparable harm but also to deal with the balance of convenience issue.

[41] The media appears to have been aware of the issues in this case for some time and the LMOs were issued some time ago. Mr. Cochrane says that he has known since October 10, 2012 about the LMOs and the related work permits, yet no evidence has been produced from individual members and miners about specifics the Court needs to know to assess irreparable harm.

[42] Mr. Cochrane says the "members of the union have expressed their concern that foreign workers will be taking jobs that could be filled by them," but this does not give the Court the information it needs to assess irreparable harm. The Applicants have attempted to remedy this defect by producing an affidavit of Mr. Christopher Misura, a barrister and solicitor who works on this case and who provides hearsay evidence related to a Mr. Trevor Wilhelmsen who presently works at the Peace River Mine. Mr. Misura relays what Mr. Wilhelmsen has to say about his experiences in applying for a job on the Project back in March 2011. Mr. Misura is a lawyer

working for the Applicants attempting to give hearsay evidence on a highly important and contentious issue. And Mr. Wilhelmsen appears to be a miner who was interested in the Project but who now has a job. So it is difficult to see how that helps the Court with the irreparable harm issue. Quite apart from being inadmissible, this affidavit tells the Court nothing about the volume of interest and the situation of other individual miners.

[43] The Applicants say they will suffer irreparable harm, but it is not clear whether they mean the unions themselves (which is not proven) or individual members. Because they are talking about the loss of jobs to the Canadian labour market, the Court assumes they must mean harm to individual members and/or to some portion of a more general labour market. Even if I were to accept that the work permits could not be removed if the LMOs are set aside (which I don't think has been demonstrated), I think I have to conclude that, although the concerns of Local 115 members are entirely genuine and understandable, this does not mean that the Court has the clear and convincing, non-speculative evidence it needs to establish irreparable harm to the Applicants, their members or a more general labour market.

[44] The Applicants' other assertions of irreparable harm are even more nebulous and are unsubstantiated with clear and non-speculative evidence. They say there will be irreparable harm to the "Canadian Labour Market" because the introduction of 200 workers paid at rates considerably lower than what is paid for comparable work will depress the labour market." Without specifics and evidence from qualified witnesses, this is conjecture. The evidence before me about prevailing wage rates is, in any event, conflicting, and it is not possible to determine any impact upon the Canadian Labour Market if the stay is not granted.

[45] The Applicants also say that there will be harm to the "rule of law" because the statutory scheme for temporary foreign workers is being undermined or ignored. In this regard they rely upon the decision in *Chicken Farmers of Ontario v Drost*, [2005] OJ No 3973 at para 42. But this paragraph deals with "harm to the regulatory system when individuals are able to knowingly and deliberately ignore it." First of all, there is no evidence before me to establish in any clear or convincing way that the statutory scheme has been deliberately or otherwise ignored in this case. There is nothing before me which suggests that HD has done anything other than secure foreign workers for the Project under the scheme presently in place. There is also nothing to suggest that the Officer did anything except apply his knowledge and discretion to the facts of the applications before him. On the present record, the allegations amount to saying that the Officer overlooked relevant facts or did not have a sufficient basis to support his conclusions, so that his Decision might be found to fall outside of the range of reasonableness posited in *Dunsmuir*. These kinds of issues are raised constantly in judicial review applications. The Officer did not, on the evidence before me, ignore or undermine the statutory scheme. He looked at the factors set out in section 203 of the Regulations and addressed them in his reasons. Even if he made a reviewable error, which has not been decided at this point, the rule of law is not damaged. Otherwise, the rule of law would be irreparably harmed every time an administrative decision is alleged to contain a reviewable error.

[46] What the Applicants appear to mean is that, if the LMOs are eventually quashed and the foreign workers retain their right to work on the Project for the full two-year period, then the legislative program and policies that say foreign workers can only be brought to Canada if qualified Canadians are not applying for the jobs will have been thwarted in this case, and this will cause irreparable harm to the rule of law in Canada.

[47] I cannot find this base assertion to be clear and convincing evidence of irreparable harm to the rule of law. In any event, I believe that this assertion is best characterized as a possible harm to the public interest which the Court should take into account under balance of convenience.

[48] All in all, I cannot say that the Applicants have established a case for irreparable harm in the clear, convincing and non-speculative way that the governing jurisprudence requires.

(4) Balance of Convenience

[49] Finally, the Applicants say that the balance of convenience favours them because:

(a) There will be a greater harm to the public interest if the injunction is not granted because of the manifest loss of job opportunities to Canadians and the undercutting of wages for Canadian workers;

(b) Allowing workers to come to Canada when there has not been proper compliance with section 203 of the Regulations would result in a complete loss of confidence by the public in the Foreign Worker Program;

(c) The Applicants and their members will suffer irreparable harm if the stay is not granted because of the loss of jobs and the undercutting of Canadian wages;

(d) HD failed to avail itself of the opportunity to avoid an injunction motion and to proceed quickly to judicial review and refused to provide documents in a timely fashion. HD should not now be able to say that the balance of convenience favours dismissing this stay motion when they have delayed in having the application finally determined;

(e) The stay would be of brief duration and would have little impact on the Project or even the bulk sample stage of the Project. There will be little, if any, prejudice to HD;

(f) The public interest strongly favours an injunction.

[50] The Applicants have not provided an undertaking as to damages on the basis that:

(a) There is no evidence from HD as to damages;

(b) This litigation is being conducted in the public interest and not with any expectation of gain for the Applicants;

(c) The lack of an undertaking as to damages is not fatal to an injunction motion such as this one and merely means that any economic harm alleged by HD should be a balance of convenience consideration.

[51] As the Applicants point out, the balance of convenience issue requires the Court to assess which of the parties would suffer greater harm from the granting or refusal of a stay pending the Judicial Review decision on the merits. Also, the factors that impact this assessment are numerous and are bound to vary with each case. In addition, public interest considerations may come into play with this balancing exercise. See, for example, *Chicken Farmers of Ontario v Drost*, [2005] OJ No 3973 at para 43.

[52] As is usual with multi-million dollar evolving projects such as the Murray River Project Mine, HD provides evidence of the significant costs and disruptions that would occur if the stay is granted, while the Applicants point to the harm they will suffer because of the loss of jobs that will

go to foreign workers as well as public interest considerations. It is clear that an injunction will halt the Project because this is why the workers are needed at this time.

[53] HD has produced extensive evidence of serious financial harm that will result to the company and others involved in the Project if the injunction issues and the 60 workers are not allowed to take up their jobs, or if future foreign workers are not allowed to come to Canada as planned.

[54] HD and the Ministers also emphasize the temporary nature of the work involved and that its purpose under the Temporary Foreign Worker Scheme is eventually to hire Canadians to work on the Project in accordance with the transition plan.

[55] The Applicants deny any significant costs to HD and say that, in any event, the financial losses to HD are simply a cost of doing business and cannot outweigh the loss of job opportunities, the undermining of the entire foreign worker program by a loss of public confidence, irreparable harm to the Applicants and their members through loss of jobs, the undercutting of Canadian wages, and the anticipated brief duration of the injunction.

[56] In my view, the only convincing potential loss the Applicants can point to, if they are successful on judicial review, would be financial loss suffered by any of their members who are qualified and interested in the jobs in question and who are willing to take them up. I do not doubt that any such loss could be extremely important for individual members, but I have no way of quantifying that loss either for any individual or collectively on the record before me.

[57] In addition, any alleged loss to the Canadian Labour Market remains nebulous and unquantifiable.

[58] I also fully acknowledge the public interest in ensuring that the Foreign Worker Program is appropriately administered. Minister Finlay, among others, has herself acknowledged problems with the program and that it is currently under review. In the present situation, however, I also think that the public also has an interest in ensuring that individuals who have been authorized to come to Canada are not left in a legal and professional limbo through no fault of their own and who may well not learn of the situation they face until they make the journey and arrive at a port of entry.

[59] There is nothing before me to suggest that HD is responsible for problems with the Temporary Foreign Worker program, or that HD was responsible for any reviewable error the Officer may have made over the LMOs. It would appear from the evidence before me that HD simply availed itself of the program as it presently exists. And yet, for doing this, the Applicants feel that HD should absorb significant costs of delay as a cost of doing business in a situation where the Applicants have not substantiated and/or quantified the losses which they claim to face, and in which they have yet to obtain leave to proceed to judicial review.

[60] There is disagreement between the parties as to what preserving the status quo means in this situation. The Applicants say that the status quo is the present situation without the additional workers who are about to arrive. On the other hand we have 60 workers who are all but on their way and who have acquired all that our system says they need to come to Canada. It is not clear how, practically speaking, these imminent arrivals could be stopped at this stage, and there is no

doubt that the scope of the relief requested by the Applicants would cause a significant disruption, not only for HD but for the workers who have qualified and are authorized to come with visas and letters of introduction.

[61] At the same time, it has to be borne in mind that there is a significant number of the 201 authorized workers who are not due to arrive for some time, so that the Applicants cannot demonstrate clearly that they will get nothing even if they are successful at judicial review, and that the whole scheme of the Foreign Worker Program will be undermined. An eventual remedy will still mean something.

[62] In addition, the Applicants have failed to provide any undertaking as to damages. They have put forward little in the way of justification for this other than that they feel they are conducting litigation in the public interest and simply don't want to expose themselves to damages. There is no indication that they are not in a position financially to provide an undertaking. While not fatal, this factor has to weigh in favour of HD.

[63] The Applicants say that the Respondents have taken a hard line in dealing with this matter which could have been resolved much earlier, so that they should be held responsible for any harm resulting from such delays. The evidence before me, however, suggests that the Respondents had acceptable reasons for resisting some of the extensive production of documents that the Applicants demanded, so that I cannot see this as a significant factor to weigh in the balance.

[64] All in all, the Applicants have not convinced me that the balance of convenience favours them in this motion. In fact, I think it favours the Respondents

V. Conclusions

[65] While the Court accepts that the Applicants have raised a serious issue, they have not established irreparable harm in the clear and non-speculative way that the jurisprudence requires, and they have not established that the balance of convenience favours them. This means that they have not satisfied the conjunctive, tri-partite test for a stay and the Court must deny the motion. This does not mean that the Applicants do not have a case to take forward to judicial review. It simply means that the Court cannot intervene at this time to impose interim relief in the manner requested by the Applicants.

[66] The Company Respondents ask for their costs on this motion in any event of the cause. Costs were not addressed in the hearing before me. The parties are at liberty to address the Court on this matter and should do so, initially at least, through written submissions.

ORDER

THIS COURT ORDERS that:

1. The motion for a stay is dismissed;

2. The parties are at liberty to address the Court on the issue of costs and should do so, initially at least, by way of written submission.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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